

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

MIGUEL ANTONIO MONDACA,

Defendant.

NO: 2:21-CR-0130-TOR

ORDER DENYING MOTION TO  
DISMISS COUNT 1 OF THE  
INDICTMENT

BEFORE THE COURT is Defendant's Motion to Dismiss Count 1 of the Indictment. ECF No. 41. The United States is represented by AUSAs Alison L. Gregoire and David M. Herzog. Defendant is represented by Corwin A. Townsend and Christian Phelps. The Court has reviewed the record and files herein, the completed briefing, and is fully informed.

**BACKGROUND**

On September 21, 2021, Defendant was charged by Indictment with three crimes: attempted kidnapping of a child (Count 1), production of child pornography (Count 2), and distribution of child pornography (Count 3). ECF No.

1 1. On April 21, 2022, Defendant moved to dismiss Count 1 of the Indictment  
2 reasoning that “the undisputed facts evidence that the Government cannot prove  
3 the charge of attempted kidnapping beyond a reasonable doubt, as there is no  
4 evidence that Defendant . . . committed a substantial step, beyond mere  
5 preparation, unequivocally demonstrating that the crime of kidnapping would have  
6 taken place unless interrupted by independent circumstances.” ECF No. 41 at 2.

7 The Government opposes Defendant’s motion, recites a lengthy set of facts  
8 it intends to prove at trial, and contends the Court must defer any insufficient  
9 evidence argument until the time of trial. ECF No. 42.

## 10 **DISCUSSION**

11 Federal Rule of Criminal Procedure 12(b)(2) allows a defendant to “raise by  
12 pretrial motion any defense, objection, or request that the court can determine  
13 without a trial of the general issue.” A pretrial motion is generally “capable of  
14 determination” before trial if it involves questions of law rather than fact. *United*  
15 *States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986) (citation  
16 omitted). “[T]he district court must decide the issue raised in the pretrial motion  
17 before trial if it is ‘entirely segregable’ from the evidence to be presented at trial.  
18 If the pretrial claim is ‘substantially founded upon and intertwined with’ evidence  
19 concerning the alleged offense, the motion falls within the province of the ultimate  
20 finder of fact and must be deferred. *Id.*

1 Here, the parties do not agree on a set of facts nor their legal significance.  
2 Accordingly, the Court must defer to the ultimate finder of fact, the jury.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

4 1. Defendant's Motion to Dismiss Count 1 of the Indictment, ECF No. 41,  
5 is **DENIED**.

6 2. The Pretrial Conference/Motions Hearing scheduled for May 12, 2022, is  
7 **STRICKEN** from the Court's calendar.

8 The District Court Executive is directed to enter this Order and furnish  
9 copies to counsel.

10 DATED May 11, 2022.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

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THOMAS O. RICE  
United States District Judge